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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. 803

THE SCOTT REALTY COMPANY,

Petitioner.

vs.

THE LASALLE & KOCH COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

EFFLER & EASTMAN,
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LEROY E. EASTMAN.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of The Scott Realty Company respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

This is an action originally brought in the Court of Common Pleas of Lucas County, Ohio, by The Scott Realty Company, the plaintiff therein, to set aside, because of fraud and irregularities, an award of arbitrators appointed to determine the value of land under a 99-year lease made in 1916, in which The Scott Realty Company, plaintiff therein, is lessor, and The Lasalle & Koch Company, defendant therein, is lessee.

The real estate involved is the site of Toledo's largest

department store, operated by respondent, and is located at the southeast corner of Adams and Huron Streets in what is known as the 100% retail district. The original building of seven stories was built by petitioner expressly for respondent in 1916, pursuant to the terms of the lease. Three additional stories were added by respondent in 1927.

The lease provides for stipulated rentals to August 1, 1939. For the 10-year period commencing on that date, the real estate, exclusive of buildings and improvements, was to be valued for the purpose of determining rentals, the same to be 4% per annum of the fair market value.

The lease contained the following provisions for the purpose of determining the value of the real estate as the basis for the rentals:

> "If the parties hereto fail to agree upon such value within the time herein provided, then the same shall be determined by arbitration in the following manner:
>
> "Not less than sixty (60) days or more than ninety (90) days prior to the beginning of each of said periods, each of the parties hereto shall select a disinterested freeholder, resident of said City of Toledo, as an arbitrator, and the two so selected shall choose a third freeholder, resident of said city, and the three so selected shall within thirty (30) days prior to the beginning of the period next thereafter succeeding, *in joint session, by a majority vote, determine and fix the fair market value of said real estate*, exclusive of the buildings and improvements thereon, and return to each of the parties hereto, in writing, signed in duplicate by any two of them, the value so determined and fixed. The value so determined and returned as aforesaid shall be binding and conclusive as to the parties hereto for the period next thereafter succeeding. And said 'Lessee' shall pay said 'Lessor' each year four (4) per cent of said value in four (4) equal installments, in advance, on the 1st day of each of the months of August, November, February and May of each year of said period."
>
> (Lease, Pl's Ex. 19, R. pp. 379-380.)

Being unable to agree upon the value, the parties each appointed an arbitrator, and the two thus selected, being unable to agree as to a third, and the parties being likewise unable to agree as to a third, they joined, pursuant to the provisions of the lease, in an application to one of the judges of the Common Pleas Court asking for the appointment of a third man. The arbitrator selected by petitioner was George P. Crosby, and the arbitrator selected by respondent was Al E. Reuben, both experienced Toledo real estate brokers familiar with values in the 100% retail district. The Common Pleas judge appointed John A. Price, a Toledo attorney inexperienced in real estate and appraisal matters, as the third arbitrator.

At the time of the appointment of the arbitrators, the presidents of the respective corporations exchanged letters (Pl's Exs. 2 to 5, R. pp. 133-135) in which they stipulated that:

> "It is understood that the requirements of said lease that the three arbitrators shall be freeholders and residents of the City of Toledo have been waived by mutual consent of the parties only for the present arbitration. It is likewise understood for said purpose that the two arbitrators selected by the parties *shall not be deemed* disqualified on the ground of interest by reason of the fact that they respectively have been, or now are, representing the parties in real estate matters."

The two arbitrators had, theretofore, been managing other properties for the respective parties. Neither of them had ever had anything whatever to do with the property involved in this suit. Their handling of other properties embraced merely the collection of rentals, supervision of repairs, negotiations with tenants and other matters incidental to the care of investment property. Neither of them had authority to make leases or otherwise bind the parties.

PROCEEDINGS OF ARBITRATORS

The arbitrators held two meetings and only two. They held no joint session; held no hearings; had no joint discussion of the factors affecting value. Mr. Price was appointed by the Common Pleas judge as the third arbitrator on June 24, 1939. On that morning he was notified of his appointment by the attorneys for the parties, and was furnished with a copy of the joint application upon which his appointment was endorsed and with a copy of the lease.

Acting as chairman, Mr. Price called the other two arbitrators to his office on June 27, 1939, for their first meeting. No one else was present. They discussed only the procedure to be followed. (R. pp. 222-225, 243-246, 641-646, 677-680, 833-836, 890-896.) Mr. Price told Mr. Reuben and Mr. Crosby that he was inexperienced in real estate and appraisal matters, and requested that they give him their ideas of value and their reasons in support thereof. Mr. Crosby was ready to proceed; Mr. Reuben was not. It was then agreed among them that Mr. Crosby and Mr. Reuben, as a preliminary, should each present to Mr. Price a written statement, setting out their ideas of value and their reasons, and that after Mr. Price had the opportunity of studying these statements he should call another meeting for discussion and consideration of the matter. (R. p. 679.) Mr. Crosby stated that he could furnish his statement the next day, but Mr. Reuben said he would require about ten days to two weeks. (R. pp. 641-644.) Mr. Crosby's statement in the form of a letter (Pl's Ex. 18, R. p. 217), together with what he called "Survey of Toledo" (Pl's Ex. 17, R. p. 215), which he had previously prepared for the Woolworth Company, were filed with Mr. Price the next day. Mr. Reuben's written statement (Pl's Ex. 11, R. p. 205), together with a letter (Pl's Ex. 12, R. p. 205), were delivered to Mr. Price on July 10,

1939. Another letter (Pl's Ex. 13, R. pp. 205, 653, 654) was delivered by Mr. Reuben to Mr. Price on July 11, 1939, Mr. Price having asked him for a breakdown of his valuation. (R. pp. 641-654.)

On July 18, 1939, the second meeting was held at Mr. Price's office, Mr. Crosby having, at Mr. Price's request, returned from his vacation in Northern Michigan for the purpose. Mr. Reuben was already there. After a few minutes of personal conversation Mr. Price picked up a sheet of paper from his desk on which he had written his valuation, and announced that he had read the "briefs," had considered economic conditions, and had decided that Mr. Crosby was too high and Mr. Reuben was too low, and that he had arrived at his value of $950,000.00.* Mr. Crosby began questioning Mr. Price and told Mr. Price that he had ignored his written statement and the information which he had furnished. Mr. Reuben then said, "We are not here to argue the matter," and "I will meet that figure." Mr. Price filled in the figure of $950,000.00 in a form of award (Pl's Ex. 9, R. p. 150) which had been prepared and delivered to Mr. Price by respondent's attorney, and Mr. Price and Mr. Reuben proceeded to sign it in a number of counterparts. Mr. Crosby refused to sign it. Mr. Price sent a counterpart of the award to each of the parties the same day by registered mail. (R. pp. 225-228, 663-666, 741-748, 845-848, 890-898.)

REQUEST FOR HEARING

Before the arbitrators met in Mr. Price's office for the preliminary meeting, Mr. Erwin R. Effler, one of petitioner's counsel, telephoned Mr. Price and stated that petitioner desired to appear and be heard by the arbitrators

* Mr. Price testified that he considered himself an umpire and acted as such (R. p. 677). This is contrary to the terms of the lease, which called for joint deliberation and joint determination.

when they were ready, and asked Mr. Price to notify him or Mr. LeRoy Eastman, Mr. Effler's partner, when the hearing would take place. Mr. Price said he would take it up with the other men when they convened, and promised to notify Mr. Effler or Mr. Eastman (R. pp. 127, 128, 144), but did not do so, for which he apologized in his testimony at the trial. (R. p. 667.)

Mr. Price further testified that he would have preferred a hearing, but that when he informed the others of Mr. Effler's telephone request, they said they could get along without the help of lawyers, and so he permitted himself to be overruled. (R. p. 692.)

CONSPIRACY AND FRAUD

The moment it was agreed among the arbitrators at the first meeting, June 27, 1939, that preliminary written statements should be filed with Mr. Price (which it was agreed should set forth the individual views of the two arbitrators appointed by the parties), Mr. Lennihan, the vice-president of respondent, and Mr. Sanger, its secretary and general counsel, with the aid of its chief statistician and its chief accountant, conspired together and with Mr. Reuben to influence and impose upon Mr. Price. These officers and agents of respondent assembled so-called statistical data, charts, tables and graphs purporting to show economic and trade conditions, to be incorporated in Mr. Reuben's statement. This material was partly false and fictitious, and that part which was otherwise authentic was carefully, cunningly and adroitly revised, reconstructed and "correlated" so that instead of presenting a reasonably true picture of economic conditions, it painted an entirely opposite picture—one as black and depressive as they could possibly make it. (R. pp. 408-439, 488-566.) While representing that the information came from publications of established and recognized bureaus such as the Bulle-

tins of the Federal Reserve Board, the Toledo Business Review, published by the University of Toledo, and the Bulletins of the Bureau of Business Research of Ohio State University, they included data, tables, etc., which are not recognized or used by those established services, but so adroitly arranged, tabulated, indexed and identified with the claimed source as to create the impression that such data constituted official and dependable indices of economic conditions. They secretly deleted or withheld data which is recognized and used by those services and which indicated favorable conditions at the time. (R. pp. 488-566.) Meetings were held by the officers of respondent above enumerated, at which this so-called statistical data was carefully reviewed. (R. pp. 461-471.) These men secretly employed, or authorized Mr. Reuben to employ, two other realtors to prepare a document which was attached to Mr. Reuben's statement to Mr. Price. (R. p. 411.) This document was falsely represented to be an appraisal of the real estate in question and an advisory opinion previously rendered by these two realtors to the Lucas County Auditor in connection with a general reappraisal for tax purposes. (Pl's Ex. 11.) No disclosure was made to Mr. Price that these men were employed and paid by respondent. (R. p. 720.) Having collaborated and connived together to obtain this false "appraisal" and to assemble, reconstruct and "correlate" the false statistical data, Mr. Sanger, respondent's secretary and general counsel, proceeded to draft the Reuben statement, his authorship or participation therein being carefully concealed. (R. pp. 160-212.)

Besides the false and distorted statistical matter incorporated in and attached to it, the Reuben statement also contained glaring misrepresentations which were deliberately designed to mislead the third arbitrator. The more vicious of these misrepresentations may be briefly summarized as follows:

(a) It falsely showed that for the previous eight

years respondent had been suffering continuing losses. (Pl's Ex. 29, R. p. 390; Pl's Ex. 35, R. p. 433.)

(b) It falsely showed that department stores generally can afford to pay as rent no more than 4% of their annual net sales. (R. p. 481.)

(c) It falsely showed that respondent's rental costs for the year 1938 were in excess of 4.2% of its net sales for that year. (R. pp. 567-585.)

(d) It falsely showed that respondent's lease on adjoining premises (known as the Smith & Baker property) was unprofitable and burdensome. (Pl's Ex. 29, R. p. 390; Pl's Ex. 36, R. p. 435; Pl's Ex. 38, R. p. 571; Pl's Exs. 66 to 71, R. p. 848; Pl's Exs. 91 to 96F, R. pp. 906-912.)

(e) It falsely showed that one of respondent's competitors (The Lamson Bros. Co.) whose store is located about a block away, outside the 100% retail district but of comparable area, the land being held under 99-year lease at a ground rental of $68,250.00 net per year, was obliged to ask its landlord for relief and had succeeded in getting a reduction in its rentals of approximately 40%. (Pl's Exs. 20, 21, 22, R. p. 440.)

All of these statements, and many others of similar import, were absolutely false and misleading as shown by the admissions of respondent's officers, by its own books and other record evidence. Mr. Price accepted the whole thing as true. He so testified. (R. pp. 719-721.) That he was completely misled is evident from the palpable inadequacy of the award.

Neither petitioner nor Mr. Crosby ever saw the Reuben statement until after the award was made and until after this suit was filed, and, hence, had no opportunity to refute the false statements and misrepresentations it contained. (R. p. 738.)

Mr. Crosby adhered to the agreement of the arbitrators in letter and in spirit. He prepared his own statement in the form of a layman's letter without help from anyone.

PROCEEDINGS IN THE STATE COURTS

The award complained of was made on July 18, 1939, signed by Messrs. Price and Reuben, and was in the amount of $950,000.00. (Pl's Ex. 9, pp. 150, 660.) On July 29, 1939, petitioner notified respondent by letter (Pl's Ex. 10, R. pp. 156, 157) that the arbitration was illegal and void, and that petitioner refused to be bound thereby. This suit was filed on August 7, 1939.

COMMON PLEAS COURT

The second amended petition set forth two causes of action,—the first to set aside the award because of fraud and conspiracy to impose upon and mislead the third arbitrator and because the arbitrators departed from the submission and did not accord the parties a hearing, and the second for a determination of the value of the land as a basis for the rents. (R. p. 1.)

After an extended trial, the Common Pleas Court set aside the award and determined the value of the real estate, exclusive of buildings and improvements, at $1,500,000.00. (R. p. 30.)

COURT OF APPEALS

On a trial *de novo,* substantially on the record made in the Common Pleas Court, the Court of Appeals of Lucas County, Ohio, on July 3, 1942, upheld the award of the arbitrators and entered judgment dismissing petitioner's second amended petition. (R. pp. 120, 122.) Having found against petitioner on the first cause of action, which was to set aside the award, the Court of Appeals did not consider the second cause of action. The finding of the Common Pleas Court as to the value of the land was not reviewed. (R. p. 117.)

After the Court of Appeals announced its decision and before the entry of judgment, petitioner made application, under Section 12223-30 of the Ohio General Code and Rule

IX of the Rules of Practice of the Court of Appeals, for special findings of fact (R. p. 45), and submitted to the court proposed findings (R. pp. 60-106) and special written interrogatories involving the ultimate facts and the material probative facts from which the ultimate facts might be inferred (R. pp. 47-59.) The Court of Appeals refused to answer the interrogatories (R. p. 118), and adopted verbatim the so-called findings of fact prepared by respondent's counsel, which consist of a number of general findings mixed with conclusions of law and omit the essential probative facts. (R. pp. 108-117.)

SUPREME COURT OF OHIO

Petitioner, on July 22, 1942, pursuant to Section 12223-4, General Code of Ohio, filed its written notice of appeal in said Court of Appeals (R. p. 122) and in the Supreme Court of Ohio (R. p. 928), thus appealing from the findings, judgment and decree of said Court of Appeals. In said notices of appeal it was stated:

> "Said appeal is on questions of law and is taken to the Supreme Court (a) in a case involving a debatable constitutional question, and (b) on condition that a motion to certify be allowed by the Supreme Court."

Petitioner accordingly appealed as of right to the Supreme Court of Ohio on the constitutional grounds and also filed its motion for an order directing the Court of Appeals to certify the record, all pursuant to Article IV, Section 2, of the Ohio Constitution. On December 16, 1942, the Supreme Court of Ohio entered its judgment dismissing the appeal as of right on the sole ground that "no debatable constitutional question is involved" (R. p. 937), and on the same date entered its order overruling petitioner's motion to certify the record. (R. p. 937.) Application for rehearing was seasonably made, which was denied on January 6, 1943. (R. p. 938.)

STATEMENT OF JURISDICTION

This Court has jurisdiction as provided in Title 28 U. S. C., Section 344, paragraph (b), Section 237, Judicial Code, as amended, to review on *certiorari* the judgment of the Court of Appeals of Lucas County, Ohio, above referred to, entered July 3, 1942. The judgment and order of the Supreme Court of Ohio, entered December 16, 1942, in effect affirmed the judgment of the Court of Appeals and made it final. The judgment of the Court of Appeals deprived petitioner of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

See *Chesapeake & Ohio Railway Co. vs. Mihas*, 280 U. S. 102;
Tumey vs. State of Ohio, 273 U. S. 510;
Hetrick vs. Village of Lindsey et al., 265 U. S. 384.

Article IV, Section 2, of the Ohio Constitution, so far as pertinent, is as follows:

> "It (the Supreme Court of Ohio) shall have * * * appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, * * *.' In cases of public or great general interest the supreme court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals. * * *"

The judgment of the Court of Appeals, which is sanctioned and affirmed by the judgment and order of the Supreme Court of Ohio, is a denial of petitioner's right to due process in two respects, namely:

(a) The Court of Appeals sanctioned and upheld the award of the arbitrators made and procured without a hearing before said arbitrators. It is, and was at the time the

lease in question was executed, the law of Ohio, as declared by the Supreme Court of Ohio in *Worthington vs. Hewes & McCann*, 19 Ohio St. 66, that an award of arbitrators appointed to value land under a 99-year lease is void unless a hearing is accorded the parties where such hearing is reasonably practicable. Under Ohio law, therefore, a hearing before the arbitrators was an essential element of due process. There was no hearing accorded petitioner, although a hearing was expressly requested by petitioner's attorney. By means of the conspiracy and fraud above recited respondent procured for itself an *ex parte* hearing. Respondent's officers and agents were permitted to submit, surreptitiously, evidence to the third arbitrator, with no opportunity for petitioner to cross examine or to refute the false statements made.

(b) The other errors of the Court of Appeals are so gross and obvious as to amount to arbitrary and capricious exercise of power. For example, the Court of Appeals

(1) Made arbitrary findings of fact which are not supported by any evidence whatsoever, and are contrary to the undisputed evidence;

(2) Made arbitrary findings of fact which are contrary to the admissions of respondent's own officers and agents and contrary to the facts shown by respondent's own books and records;

(3) Arbitrarily assumed that the officers and attorneys of the parties had the inherent power and authority to bind the parties, both corporations, to a material departure from and modification of the provisions of the 99-year lease, so that the requirements of joint session, joint deliberation and joint determination of the value of the land were dispensed with and the third arbitrator became the umpire. There is no evidence of such authority or of any prior course of dealing by the parties, and it is the settled law of Ohio

that, in the absence of express authority conferred upon its officers and agents or of such a course of dealing with the other party as clearly implies authority, a corporation can be bound only by its Board of Directors. *Bradford Belting Company vs. Gibson,* 68 Ohio St. 442; *Kroeger, Superintendent of Building & Loan Associations, et al. vs. Brody, Trustee,* 130 Ohio St. 559; *State, ex rel. Squire, Superintendent of Banks, vs. Frasier et al.,* 133 Ohio St. 283; *Storms vs. United Grain & Millworkers' Union,* 64 Ohio App. 19; *Royal Indemnity Company vs. McFadden et al.,* 65 Ohio St. 15;

(4) Arbitrarily held that the two arbitrators selected by the parties were the agents and representatives of the parties, with authority to bind the parties to a departure from the terms and requirements of the lease and so as to justify the crafty machinations of respondent above set forth.

Other gross and obvious errors of the Court of Appeals are pointed out in the supporting brief.

It is contended on the showing herein made that the federal questions involved are substantial. The federal questions were raised by notice of appeal filed in the Court of Appeals July 22, 1942 (R. p. 122), and by similar notice filed on the same date in the Supreme Court of Ohio (R. p. 928), and by assignment of errors filed in the Supreme Court of Ohio August 6, 1942 (R. p. 934), and by application for rehearing filed in the Supreme Court of Ohio December 30, 1942. (R. p. 935.) The assignment of errors makes specific reference to petitioner's claim that the findings, orders, judgment and decree of the Court of Appeals in sustaining said award violated petitioner's right to due process of law under Section 1 of the Fourteenth Amendment of the Constitution of the United States in that:

"(a) Appellant was denied a hearing before said arbitrators;

"(b) The errors of the Court of Appeals are so gross and obvious as to amount to arbitrary and capricious exercise of power." (R. p. 931.)

The application for rehearing filed in the Supreme Court likewise makes specific reference to the violation of the Fourteenth Amendment.

These federal questions were passed upon adversely by the Supreme Court of Ohio by its judgment and order of December 16, 1942, and by its decision of January 6, 1943, in which the application for rehearing was denied.

The Supreme Court of Ohio rendered no opinions. The Court of Appeals opinion is attached as an appendix to the supporting brief. The Court of Appeals opinion is not officially reported.

QUESTIONS PRESENTED

The questions presented to the court in this case are these:

(1) Where the settled law of Ohio as declared by the long standing decision of its highest court, requires that arbitrators in determining the value of land under a 99-year lease shall accord the parties a hearing whenever practicable as a condition to the validity of their award, is not such hearing an essential element of due process so that the enforcement by the state courts of an award made without hearing constitutes a denial to petitioner of due process of law under Section 1 of the Fourteenth Amendment?

(2) Where the judgment of the state court is based upon arbitrary findings of fact, unsupported by any evidence and contrary to the undisputed evidence, has not petitioner's right to due process of law been denied?

(3) Where the judgment of the state court is based upon errors so gross and obvious as to border on arbitrary

action, has not petitioner's right to due process of law been denied?

ASSIGNMENTS OF ERROR

The Supreme Court of Ohio erred:

(1) In dismissing petitioner's appeal as of right;

(2) In overruling petitioner's motion for an order requiring the Court of Appeals to certify its record for review, so that under the law of Ohio the judgment of the Court of Appeals became final;

(3) In denying petitioner's application for rehearing.

The Court of Appeals of Lucas County, Ohio, erred:

(1) In finding and adjudging in favor of respondent and against petitioner;

(2) In sustaining the award of the arbitrators, which was made and procured without a hearing being accorded petitioner, was induced by fraud of respondent, was arrived at contrary to the terms of the submission and by means of an *ex parte* hearing accorded respondent;

(3) In making arbitrary findings unsupported by any evidence and contrary to the undisputed evidence.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner respectfully urges that the writ should issue because:

(1) In dismissing petitioner's appeal as of right and overruling petitioner's motion to require the Court of Appeals to certify the record, the Supreme Court of Ohio erroneously decided questions arising under the Fourteenth Amendment to the Federal Constitution adversely to petitioner's contentions and, it is believed, contrary to the decisions of this Court.

(2) Under our system of jurisprudence arbitrary and capricious action by our courts is intolerable. The errors of the Ohio Court of Appeals in this case are so gross and

obvious as to constitute arbitrary action and a denial of due process to petitioner.

(3) The determination of the issues arising in this case not only affects petitioner's property rights, which are of great value, but likewise affects similar proceedings which will be required at periodic intervals in the future under its 99-year lease, and likewise affects innumerable similar leases not only in the State of Ohio but throughout the nation.

There is filed herewith the brief of petitioner in support of this petition for writ of *certiorari,* to which reference is respectfully made for discussion of the law involved and of the authorities in support of the rights claimed on behalf of petitioner.

Wherefore, your petitioner respectfully requests that this Court issue a writ of *certiorari* to the Supreme Court of the State of Ohio [redacted] to certify and send to this Court a full and complete transcript of the record herein to the end that the cause may be reviewed and determined by this Court as provided by law, and that the judgment and decree may be reversed with costs, and for such other and further relief as may be appropriate and granted in the premises.

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